

IN THE
SUPREME COURT OF THE UNITED STATES

— o —

October Term, 1976

No.

— o — **76-1294**

Dutta Seshachalam,

Petitioner,

v.

Creighton University
School of Medicine,

Respondent.

— o —

Petition for Writ of Certiorari

— o —

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March, 1977

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Proceedings Below

Petitioner seeks review of the Order of the Court of Appeals for the Eighth Circuit dismissing petitioner's appeal from the District Court of the District of Nebraska as untimely and further refusing to docket petitioner's appeal from the Order of the District Court for the District of Nebraska refusing to extend petitioner's time for appeal under the provisions of FRAP 4(a). This Order was entered February 10, 1977, and to petitioner's knowledge has not yet been reported. The Order of the Court of Appeals of December 13, 1976, remanding the case to the District Court for determination of whether excusable neglect existed, is reported at 545 F. 2d 1147.

Jurisdiction

1. The Order of the Court of Appeals sought to be reviewed was filed February 10, 1977.

2. A Motion for Rehearing and Rehearing En Banc was mailed for filing with the Court of Appeals on February 15, 1977. The Motion was overruled by Order entered February 25, 1977.

3. Jurisdiction to review the proceedings below on Writ of Certiorari is founded on 28 U.S.C.A. § 1254.

Questions Presented for Review

The questions presented for review are:

1. Is an Order of a District Court refusing to extend the time for appeal under the provisions of FRAP 4(a) itself an appealable order?

2. Is it excusable neglect within the meaning of FRAP 4(a) for petitioner to rely on previous practice within the district and the circuit as to what types of motions stay the running of the time for appeal?

Statutory and Rule Provisions

28 U.S.C.A. § 2107 provides, in pertinent part:

"Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

* * *

"The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on

"failure of a party to learn of the entry of the judgment, order or decree."

Rule 4(a) FRAP provides, in pertinent part:

"The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

"Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate."

Statement of the Case

On August 9, 1976, the District Court for the District of Nebraska entered an Order of Dismissal herein after trial. On August 13, 1976, petitioner filed a motion captioned Motion for Reconsideration, stating that a brief would be filed in support thereof. On August 24, 1976, before the brief

was filed, the District Court overruled petitioner's motion. Thereafter, believing the previous motion to have been summarily treated because of lack of accompanying brief, on August 31, 1976, petitioner caused to be filed a motion captioned Motion for New Trial with accompanying brief. On the same date, respondent filed an objection to the motion on the ground that it was untimely. The District Court overruled this motion on September 28, 1976, five days after petitioner's time for appeal from the Order of August 24, 1976, had expired. The motion was overruled on the ground that it was untimely. The ruling was not, therefore, on the merits.

Petitioner then filed a Notice of

Appeal on October 1, 1976. Respondent filed a Motion to Dismiss the appeal on October 27, 1976, and petitioner filed a resistance thereto on November 5, 1976, supplemented by letter on November 15, 1976.

The Court of Appeals, holding that petitioner's reliance on Hicklin v. Edwards, 222 F. 2d 921 (CA8, 1955) and past practice within the district was unfounded, remanded to the District Court on December 13, 1976, to determine whether excusable neglect under FRAP 4(a) existed. Petitioner had read Hicklin v. Edwards to say that however a motion was captioned, it stopped the time for appeal from running if it called into question the legality of the basic order or judgment. On January 24, 1977,

the District Court held that excusable neglect was not present, and denied petitioner's motion to file the Notice of Appeal of October 1, 1976, nunc pro tunc. On January 25, 1977, petitioner filed Notice of Appeal from the District Court's Order denying relief under FRAP 4(a). Petitioner also filed in the Court of Appeals a motion for relief in the nature of a Writ of Mandamus to compel the District Court to accept for filing the Notice of Appeal of October 1, 1976.

On February 10, 1977, the Court of Appeals dismissed the appeal and refused by indirection to docket the appeal from the Order of the District

Court of January 24, 1977.* On February 14, 1977, petitioner formally tendered the docket fee for the new appeal, and on February 15, 1977, the Court of Appeals formally refused the tender and refused to docket the new appeal. Also, on February 15, 1977, petitioner filed in the Court of Appeals a Motion for Rehearing and for Rehearing En Banc. On February 15, 1977, the Court of Appeals denied petitioner's

* The District Court never did acknowledge the filing of the notice of appeal on January 25, 1977, by furnishing the usual copy of docket entries or copy of transmittal letter to the Court of Appeals. The method by which the Court of Appeals became aware of the District Court's Order of January 24, 1977, does not appear of record.

motion for an order in the nature of a Writ of Mandamus. On February 25, 1977, the Court of Appeals denied petitioner's motion for rehearing. Petitioner filed his Motion to Stay Mandate and request for certification of the record on March 4, 1977.

The Federal jurisdiction in the District Court was founded on Sections 1331 and 1343 of Title 28, U.S.C. and Sections 1981 and 2000e, et seq., of Title 42, U.S.C.

Argument

Petitioner alleges that review here is appropriate because the Eighth Circuit is now in conflict with the Second Circuit ¹ as to the appealability

1. Matter of Orbitec Corporation, 520 F. 2d 358, 360 (CA2, 1975)

of an order refusing to grant relief under FRAP 4(a), and because the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as set forth in U.S. v. Dieter, ___ U.S. ___, 97 S.Ct. 18, 19 (1976) as to require the exercise of this Court's power of supervision.

The questions involved in this case are ones of first impression for this court, and involve important questions of judicial administration which this Court should decide so that the course of procedure may be uniform for all Federal Courts.

I. Appealability

Section 1291 of Title 28 U.S.C.A.

provides:

"The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

An appeal under this section is a matter of right, not of discretion of the court. Brewer v. U.S., 375 F. 2d 285 (CA5, 1967); Coppedge v. U.S., 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed. 2d 21 (1962).

The Second Circuit treats the appealability of an order denying an extension of time for appeal on grounds of excusable neglect as beyond question. In Matter of Orbitec Corporation, 520 F. 2d 358, 360 (CA2, 1975) that court

said:

"It is not disputed that an order refusing to grant an extension under the last paragraph of Rule 4(a) is appealable. Nichols-Morris Corp. v. Morris, 272 F. 2d 586 (2 Cir. 1959), see also 279 F. 2d 81 (2 Cir. 1960). And the mere fact that, as would normally be the case, any reversal of an order refusing to grant an extension did not occur until after the expiration of the additional 30 days which are the maximum permitted by the final paragraph of Rule 4(a) would not be fatal to the appeal from the underlying judgment. 9 Moore, Federal Practice 1P 204.11[4] at 980 n. 1 (1973 ed.)."

Here, the Eighth Circuit did not even permit the appeal to be docketed, let alone consider the appeal. The contrast between the Circuits could not be more stark. The requirement for intervention of this Court in its supervisory capacity over the lower federal courts could not

be more clear.

II. Excusable Neglect

This Court has firmly adopted a policy favoring reconsideration of a judgment at the lowest possible level. The application of Procrustean Bed standards to the facts of this case by both the District Court and the Court of Appeals calls for intervention by this Court in its supervisory capacity.

In U.S. v. Dieter, ___ U.S. ___, 97 S.Ct. 18, 19 (1976) this court said:

"The Court of Appeals misconceived the basis of our decision in Healy. We noted there that the consistent practice in civil and criminal cases alike has been to treat timely petitions for rehearing as rendering the original judgment nonfinal for purposes of appeal as long as the petition

"is pending. 376 U.S., at 78-79, 84 S.Ct. at 555-556.³

3. The Court of Appeals' concern with the lack of a statute or rule expressly authorizing treatment of a post-dismissal motion as suspending the limitation period ignores our having grounded our decision in Healy not on any express authorization (which was similarly lacking in Healy) but rather on 'traditional and virtually unquestioned practice.' 376 U.S., at 79, 84 S.Ct., at 556.

"To have held otherwise might have prolonged litigation and unnecessarily burdered this Court, since plenary consideration of an issue by an appellate court ordinarily requires more time than is required for disposition by a trial court of a petition for rehearing. Id., at 80, 84 S.Ct. at 556. The fact that appeals are now routed to the courts of appeals does not affect the wisdom of giving district courts the opportunity promptly to correct their own alleged errors, and we must likewise be wary of imposing added

"and unnecessary burdens on the courts of appeals. These considerations fully apply whether the issue presented on appeal is termed one of fact or of law, and the Court of Appeals' law/fact distinction - assuming such a distinction can be clearly drawn for these purposes - finds no support in Healy. It is true that the government's post-dismissal motion was not captioned a 'petition for rehearing,' but there can be no doubt that in purpose and effect it was precisely that, asking the District Court to 'reconsider [a] question decided in the case' in order to effect an 'alteration of the rights adjudicated.' Department of Banking v. Pink, 317 U.S. 264, 266, 63 S.Ct. 233, 234, 87 L.Ed. 254."

This is a clear enunciation of a policy of reviewing a judgment at the District Court level if at all possible and favoring the interpretation of post-trial motions, however captioned, as motions which stop the running of the time for appeal.

The Eighth Circuit had previously had such a rule. In Hicklin v. Edwards, 222 F. 2d 921, 922 (CA8, 1955) that court said:

"Whether the defendant's motion be termed a motion for new trial or a motion for rehearing is, we think, of no consequence. See, Safeway Stores, Inc. v. Coe, 78 U.S. App. D.C. 19, 136 F. 2d 771, 773, 148 A.L.R. 782; Calvin v. Calvin, D.C. Cir. 214 F. 2d 226, 228. The motion clearly and emphatically challenged the legality of the order of December 27, 1954, from which the defendant appeals, and asked for a rehearing 'and for a new trial.' The motion afforded the court an opportunity to change that order if so advised. The motion was entertained and ruled upon by the District Court and the order of December 27, 1954, did not become appealable until the motion was overruled. The rule is that 'where a petition for rehearing, a motion for a new trial, or a motion to vacate, amend or modify a judgment is seasonably made and entertained,

"the time for appeal does not begin to run until the disposition of the motion." Leishman v. Associated Wholesale Electric Co., 318 U.S. 203, 205-206, 63 S.Ct. 543, 54, 87 L.Ed. 714; United States v. Muschany, 8 Cir., 156 F. 2d 196."

In this case, however, the Eighth Circuit interpreted Rule 59 strictly, saying that if the motion is captioned a motion for new trial, it may only be timely filed within 10 days of the judgment.

The only purpose of petitioner in filing the motion captioned motion for new trial was to give the District Court an opportunity to review the case fully on its merits with petitioner's brief before it. The District Court, after trial, rendered judgment adverse to petitioner on August 9, 1976. On August 13, 1976, petitioner

filed a motion captioned Motion For Reconsideration, requesting oral argument and stating that a brief was forthcoming. On August 24, 1976, before petitioner could file his brief, the motion was overruled. The quick action in this case compared to another case before the same judge¹ led petitioner's counsel to believe that the motion had been disposed of summarily under the local rules for failure to file brief, rather than on the merits. Petitioner then filed a motion captioned Motion for New Trial on August 31, 1976, accompanied by a

1. Baker v. Stuart, Dist. of Nebr., CV 74-0-149, CA8 #76-1860, where the motion was filed April 28, 1976 and ruled on August 3, 1976.

brief, and seeking plenary review at the trial level. On the same date, respondent filed an objection to the motion as being untimely. Petitioner was then in a box - he could rely on his motion, however captioned, being treated as a motion stopping the running of the time for appeal in accordance with Eighth Circuit and other precedent, or he could appeal the order of August 24, 1976, depriving the District Court of an opportunity for full review of its own order. With the objection pending, it further was reasonable for petitioner to rely on the district judge, to some extent, to act on the new motion before petitioner's time for appeal of the order of August 24, 1976, expired. Instead, the district court did not act

until September 28, 1976, and then ruled not on the merits, but on the ground that petitioner's motion was untimely. This ruling was contrary to the experience of petitioner's counsel within the district - see, e.g., Rohr v. Western Electric, CA8 #76-1355, appeal pending, where motion for reconsideration followed motion for reconsideration finally followed by a motion for new trial.

This ruling is also contrary to precedent in other circuits. The Second Circuit holds a "motion for reargument" to be a motion stopping the running of the time for filing an appeal under FRAP 4(a), even though it is not mentioned in the rule.

Theodoropoulos v. Thompson-Starrett

Company, 418 F. 2d 350 (CA2, 1969).

The Sixth and Ninth Circuits hold that a motion for reconsideration, though not enumerated in FRAP 4(a), is sufficient to stay the time for appeal. Peabody Coal Co. v. Local U. Nos. 1734, et al., 484 F. 2d 78 (CA6, 1973) and Pacific Maritime Assn. v. Quinn, 465 F. 2d 108 (CA9, 1972). The Tenth Circuit has held that an improperly designated motion "for new trial" may be considered as being one for rehearing, stopping the time for appeal. Jones v. Nelson, 484 F. 2d 1165 (CA10, 1973).

Prior to the 1966 amendments, FRAP 4(a) and its predecessors, provided for relief from excusable neglect only in cases in which counsel did not become aware of the entry of the judgment.

See 28 U.S.C.A. § 2107. The elimination of the limiting phrase "based on failure of a party to learn of the entry of the judgment, order or decree" was intended to give the court some latitude in situations not then foreseen by the committee, but which might, in equity, deserve relief. 9 Moore's Federal Practice, ¶ 203.25[3], p. 783.

This case seems extraordinary enough to warrant the relief provided. Both the Circuit and the District had previously disregarded captions to post-trial motions in determining whether the motion challenges the legality of the prior order.

A change or clarification in a rule of procedure, as a matter of sound

judicial administration, should be made to operate prospectively only. See, e.g., Linder v. All State Administrators, Inc., 414 U.S. 685, 97 S.Ct. 771, 772, 39 L.Ed. 2d 90 (1974).

Conclusion

The court should grant the Petition for Certiorari to resolve the conflict in the Circuits as to the appealability of determination of excusable neglect under FRAP 4(a).

The Court should determine, in the exercise of its supervisory function over the lower Federal Courts, that a change or clarification of a procedural rule shall operate only prospectively, eliminating the "Catch 22" aspects of this case.

Alternatively, if the Court does not desire plenary consideration of the matters herein presented at this time, it should grant the Writ and remand to the District Court with directions to vacate its order of August 13, 1976, and reenter it, making it appealable.

Respectfully submitted,
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Annex
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UNITED STATES COURT OF
APPEALS FOR THE EIGHTH
CIRCUIT

No. 76-1949

Order of February 25, 1977

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

Order of February 17, 1977

Appellant's motion under Rule 2 in the nature of a writ of mandamus to the district court directing it to enter an order accepting plaintiff's notice of appeal nunc pro tunc on grounds of excusable neglect is denied.

Letter of February 16, 1977

Dear Sir:

I have received your letter of February 14, 1977 with enclosure. I have discussed the posture of this case with the Court and I am directed to state to you that in view of the Court's order of February 10, 1977 I am to decline to accept your docket fee and to docket another case in this matter. Your check is, accordingly, returned herewith.

Order of February 10, 1977

In our opinion filed December 13, 1976, we remanded this case to the district court to give appellant the opportunity to request that the district court accept nunc pro tunc the notice of appeal filed on October 1, 1976, on grounds of excusable neglect. We further indicated: "Until such determination, action on the motion to dismiss will be deferred."

We have now received the district court's determination that it "cannot conclude that the plaintiff's failure to file a timely notice of appeal constituted excusable neglect." We have received what has been designated "Notice of Appeal" from the foregoing

district court's opinion. Nevertheless, it is our view that under the circumstances this appeal in its entirety must be dismissed without further review. Stirling v. Chemical Bank, 511 F. 2d 1030, 1032-33 (2d Cir. 1975); Evans v. Jones, 366 F. 2d 772 (4th Cir. 1966). Dismissed.

DISTRICT COURT FOR
THE DISTRICT OF
NEBRASKA

CV 75-0-376

Order of January 24, 1977

Pursuant to the accompanying memorandum,

IT IS HEREBY ORDERED that the plaintiff's motion nunc pro tunc to extend the plaintiff's time for filing of a notice of appeal,

filing 35, is denied.

Memorandum of January 24, 1977

Pursuant to the remand of the Eighth Circuit Court of Appeals, this matter is before the court on consideration of the plaintiff's request to accept "nunc pro tunc" the notice of appeal filed on October 1, 1976. Because the time for filing of an appeal ended on September 23, 1976, the notice can be accepted only upon a showing of excusable neglect. Rule 4(a) of the Federal Rules of Appellate Procedure.

Professor Moore indicates that prior to 1966 the forbear of this rule required a showing of "excusable neglect based on a failure of a party to learn of the entry of judgment." The 1966

amendment eliminated the latter clause, but Professor Moore states, "That history is relevant to the answer of what constitutes excusable neglect [today]." 9 Moore's Federal Practice, IP 204.13[1], pp. 967-969.

The Advisory Committee Note accompanying the adoption of the rule states:

"In view of the ease with which an appeal may be perfected, no reason other than failure to learn of the entry of the judgment should ordinarily excuse a party from the requirement that the notice be timely filed. But the district court should have authority to permit the notice to be filed out of time in extraordinary cases where injustice would otherwise result."

9 Moore's Federal Practice, IP 203.25[3], p. 783

The showing made by the plaintiff in support of a finding of excusable

neglect is as follows: When counsel for the plaintiff filed a second motion, which was denominated a motion for new trial, he had thought that the time for the filing of an appeal was thereby enlarged. The Court of Appeals has now held that this view was erroneous. Counsel also indicates that this second motion was filed in response to the action of the court in denying his first motion prior to his submission of a brief. He considered that the court had probably denied his first motion for failure to submit a brief and thus he sought a ruling on the merits of the motion by filing a second such motion. His reason for not having submitted a brief previously revolves around the press of business at his office made necessary

by the recent marriages of his two sons and his own physical examination.

Additionally, he attended a week-long conference of the Association of Labor Mediation Agencies in Ottawa, Ontario, from August 15 to 20, 1976, as the official representative of the State of Nebraska in his capacity as presiding judge of the Nebraska Court of Industrial Relations.

It is true that the plaintiff's initial motion, filed August 13, 1976, concluded: "Oral Argument requested. Brief in support of Motion follows." The Rules of Practice of the United States District Court for the District of Nebraska are clear as to the time at which a motion is deemed submitted.

Rule 20 states:

"A. Oral Argument: Oral argument shall be had only upon order of the court

* * *

"C. Briefs: Upon filing a motion, the party shall at the same time serve upon all other parties a written memorandum brief . . . In like manner, each adverse party may, within five days after service of the motion, serve and deliver a written memorandum brief in opposition to the motion. (Emphasis added)

"D. Failure to Serve Brief: If the moving party fails to serve a memorandum brief, the court may deem the motion abandoned and enter an order denying it, and in that event, Rule 12(a)(1) of the Federal Rules of Civil Procedure shall apply. Failure of an adverse party to serve a memorandum brief shall not be considered as a confession of the motion.

* * *

"F. Submission on Briefs: If no oral argument is ordered, a motion, except a motion for summary judgment, shall be considered submitted five days after filing and thereafter shall be decided by the court upon the briefs submitted. (Emphasis added)

"G. Extension of Time: For good cause shown, the court may extend the time for the doing of any act required by this rule."

Thus, a motion is deemed submitted five days after filing, absent some communication with the court requesting an extension of time in which to file a brief or a formal motion to that effect, followed by an indication from the court, either formally or informally, that such an extension is permitted. The plaintiff's mere announcement that "Brief in support of Motion follows." can in no way be considered to be a

request for an extension which will invariably be granted. Because no oral argument was ordered by the court, and no extension of time in which to file a brief was granted, the first motion (for reconsideration) was deemed submitted as of August 20, 1976, and was denied by order of the court dated August 24, 1976.

Nothing justified the counsel in supposing that the court had relied on Rule 20 D, rather than 20 F, in denying the first motion, although I grant that I could have and I wish I would have stated in the order that the decision was on the merits.

As to the plaintiff's reasons for not having filed a timely notice of

appeal, I think it is clear that the mere press of business is not generally sufficient to establish excusable neglect.

Maryland Casualty Company v. Connor,

382 F. 2d 13 (C.A. 10th Cir. 1967). In this regard, Robert Stern, a member of the Advisory Committee of Appellate Rules, stated:

"The Committee intended that the standard of excusable neglect remain a strict one, however. We did not want lawyers to be taking advantage of this extra 30 days as a matter of course; it is not meant to cover the usual excuse that the lawyer is too busy, which can be used, perhaps truthfully in almost every case. It is hoped that the bar will invoke and the courts will give effect to this less stringent standard in the spirit in which it was written -- that is, to take care of emergency situations only."

Stern, "Changes in Federal Appellate Rules," 41 F.R.D. 297

If counsel assumed, as he apparently did, that the filing of the second motion automatically enlarged the time for appeal, he could do so only on the assumption that the second motion was timely.

An important factor here is the defendant's objection to the plaintiff's second motion, filing 27. That objection was filed and served on counsel for the plaintiff on August 31, 1976, the same day on which counsel for the plaintiff had filed the second motion. The objection states:

"Comes now the defendant, Creighton University School of Medicine, and respectfully shows to the court that the Motion for New Trial filed herein by the plaintiff has not been filed or served within

"the time provided by the provisions of Rule 59(b) of the Federal Rules of Civil Procedure, and that accordingly the same should be denied."

At that time, then, counsel for the plaintiff knew that a challenge was being made to the assumption that the second motion could form a basis for appeal on the theory that it was timely because a denial of the first motion extended the time for filing a second motion. The filed objection should have driven him to Rule 59(b) of the Federal Rules of Civil Procedure, cited in the objection, where he would see that such a motion must be filed "not later than 10 days after the entry of the judgment," a point of time already passed. At that moment there remained 23 days in which an appeal could be taken.

But counsel did not explore the matter at that point, apparently, or if he did he chose to rely upon his interpretation of the rules. His decision thus resembles more of a tactical decision based on an analysis of conflicting legal opinions of counsel rather than a reliance on a "practice [that] counsel had used before without question" and whose rejection by the court reflects on his "professional knowledge." Cf. Linabara v. Maritime Overseas Corporation, 376 F. Supp. 688 (U.S.D.C. S.D. N.Y. 1973). While counsel's unfamiliarity with local practice has itself been held insufficient to constitute excusable neglect, Buckley v. United States, 382 F. 2d 611

382 F. 2d 611 (C.A. 10th Cir. 1967), the facts of the instant case present an even more compelling argument against the finding of excusable neglect, because of defendant's serving the plaintiff with notice of its position on the timeliness of the second motion.

Counsel for the plaintiff cites Hicklin v. Edwards, 222 F. 2d 921 (C.A. 8th Cir. 1955), in support of his contention that he reasonably relied on Eighth Circuit Court of Appeals precedent in concluding that he had thirty days from the denial of the second motion for reconsideration in which to file a notice of appeal. However, I think Hicklin is distinguishable. In Hicklin, a default judgment was

entered against the defendant. Some months later the defendant filed a motion to set aside the default judgment; that was denied. Within ten days thereafter, the defendant moved for a rehearing of the denial of the motion to set aside the default. That was also denied, and the defendant filed a notice of appeal within thirty days of the latter denial. The question before the court was whether the motion for rehearing, conceded by the plaintiff as timely filed, was the type of motion which would stay the running of the time for the filing of a notice of appeal.

The court said:

"Whether the defendant's motion be termed a motion for a new trial or a motion for rehearing is, we think, of no consequence.

"See, Safeway Stores, Inc. v. Coe, 78 U.S. App. D.C. 19, 136 F. 2d 771, 773, 148 A.L.R., 782; Calvin v. Calvin, D.C. Cir., 214 F. 2d 226, 228. The motion clearly and emphatically challenged the legality of the order of December 27, 1954 [the denial of the motion to set aside the default judgment], from which the defendant appeals, and asked for a rehearing 'and for a new trial.' The motion afforded the court an opportunity to change that order if so advised. The motion was entertained and ruled upon by the District Court, and the order of December 27, 1954, did not become appealable until the motion was overruled. The rule is that 'where a petition for rehearing, a motion for a new trial, or a motion to vacate, amend or modify a judgment is seasonably made and entertained, the time for appeal does not begin to run until the disposition of the motion.' Leishman v. Associated Wholesale Electric Co., 318 U.S. 203, 205-206, 63 S.Ct. 543, 544, 87 L.Ed. 714; United States v. Muschany, 8 Cir., 156 F. 2d 196."

It is important to note that a motion to set aside the entry of default judgment is timely if made within the time restrictions of Rule 60(b) of the Federal Rules of Civil Procedure. Rule 55(c) of the Federal Rules of Civil Procedure. Hicklin appears to stand only for the proposition that when a motion to set aside a default judgment is denied, the correctness of the denial of that motion can be questioned by a motion for reconsideration, however titled, made within ten days of its denial. Such a motion for reconsideration in no way stays the running of the time for filing notice of appeal from the original entry of judgment, but does stay the time for the filing of a

notice of an appeal from the denial of the motion to set aside the default judgment.

Here, the initial motion for reconsideration, filed within ten days of the entry of judgment, called into question the correctness of the judgment. The second motion, filed more than ten days after the entry of judgment, also sought to call into question the correctness of the judgment. That could not properly be done at that time, and Hicklin does not hold otherwise. Cf. Cline v. Hoogland, 518 F. 2d 776 (C.A. 8th Cir. 1975). I conclude that counsel's reliance on Hicklin was misplaced and cannot be said to be excusable neglect.

Unfortunately, the second motion filed by the plaintiff was not ruled on by the court until September 28, 1975, five days after the plaintiff's appeal rights had expired. While an earlier ruling by the court might have eliminated the entire problem here, I think it not an infrequent occurrence that court delays necessitate a party's consideration of alternative tactics in support of that party's legal position. There is nothing before me that suggests that an earlier ruling would likely have resulted in the filing of a notice of appeal by September 23.

Under the facts as presented here, I cannot conclude that the plaintiff's failure to file a timely

notice of appeal constituted excusable neglect.

COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

No. 76-1949

Opinion of December 13, 1976

PER CURIAM.

The appellee has moved to dismiss this appeal on the basis of appellant's failure to file a timely notice of appeal. We postpone ruling on the motion and remand the case to permit the appellant to request the district court to accept nunc pro tunc the notice of appeal filed on October 1, 1976, on grounds of excusable neglect.

The district court's¹ order and judgment was filed on August 9, 1976. On August 13 appellant filed and served a motion for reconsideration, which was denied by the district court on August 24, 1976. On August 31, 1976, appellant filed and served a motion for new trial, which was denied on September 29, 1976, as being untimely filed. Appellant then filed his notice of appeal on October 1, 1976.

Rule 4(a), F.R.A.P., provides that notice of appeal in civil cases must be filed within 30 days of the

1. The Honorable Warren K. Urbom, Chief Judge, United States District Court for the District of Nebraska.

entry of the judgment or order appealed from. The running of the 30 day period is tolled only by the timely filing of motions under Fed. R. Civ. P. 50 (b), 52 (b) or 59. Appellant filed a motion for reconsideration four days after entry of judgment. Although entitled a motion for reconsideration, the motion drew in question the correctness of the judgment. Therefore it was functionally a motion under Fed. R. Civ. P. 59(3). See Hicklin v. Edwards, 222 F. 2d 921, 922 (8th Cir. 1955); Sea Ranch Ass'n. v. California Coastal Zone Conservation Comm'ns., 537 F. 2d 1058, 1061 (9th Cir. 1976); 9 Moore's Federal Practice IP 204.12[1],

at 951 (2d ed. 1975). Since the motion for reconsideration was served within ten days of the entry of judgment, it tolled the time for filing the notice of appeal. As a consequence, the 30 day period for filing the notice of appeal did not begin running until August 24, 1976, when the district court denied the motion for reconsideration. The last day of the 30 day period for filing the notice of appeal was September 23, 1976. Since appellant filed the notice of appeal on October 1, 1976, it was not timely filed.

Appellant contends his second postjudgment motion, a motion for new trial, tolled the time for filing the

notice of appeal. The motion for new trial was filed and served on August 31, 1976, outside of the ten day period imposed by Fed. R. Civ. P. 59(b). Therefore it was not timely. It follows that the motion for new trial did not toll the appeal time. 6A Moore's Federal Practice 1P 59.09[3], at 59-209-211 (2d. ed. 1975).

Appellant requests, should this court hold that the notice of appeal was not timely filed, that he be allowed to seek from the district court an extension of time within which to file the notice of appeal on the grounds of excusable neglect, as is allowed by the last paragraph of F.R.A.P. 4(a). It is our view that

under all the circumstances such permission should be granted. Compare Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Kurtenbach, 525 F. 2d 1179, 1183 (8th Cir. 1975). Cf. Cline v. Hooqland, 518 F. 2d 776 (8th Cir. 1975).

We therefore remand this case to the district court to give appellant the opportunity to request that the district court accept nunc pro tunc the notice of appeal filed on October 1, 1976, on grounds of excusable neglect. Until such determination, action on the motion to dismiss will be deferred.

Remanded.